Supreme Court, U.S.
FILED

NO. 01 315 AUG 2 1 2001

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ANGELA MCAFEE, individually, and ANGELA MCAFEE, as next friend of, as natural guardian of, and as guardian of the property of DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, and MICHAEL CHASE MCAFEE, minors,

Petitioners

vs.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Counsel for Petitioners:

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28 pp

QUESTIONS PRESENTED

(1) This case presents an issue of first impression. Pursuant to the decision of this Court in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 143 L.Ed.2d 448, 119 S.Ct. 1322 (1999) is the Defendant's removal of a case from a State Court to the United States District Court premature if such removal is made before service of process takes place when no waiver of service has been made by the Defendant?

LIST OF PARTIES INCLUDING PARENT AND SUBSIDIARY CORPORATIONS

Counsel of record for Petitioners certifies that the following listed parties, including parent and subsidiary corporations have an interest in the outcome of this case.

Parties: Angela McAfee

David Russell McAfee, Jr., by his natural guardian, Angela McAfee

Brandon Charles McAfee, by his natural guardian, Angela McAfee

Michael Chase McAfee, by his natural guardian, Angela McAfee

Transamerica Occidental Life Insurance Company

Transamerica Corporation

Aegon N.V. (Parent Company)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. A copy of same is attached hereto as Appendix A. The Court of Appeals' denial of Petitioners' Petition for Rehearing En Banc is not reported and is attached hereto as Appendix B. The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, is reported at 2000 U.S. Dist. Lexis 19615 (N.D.Ga. 2000), however, that opinion fails to deal with the issue presented by this Petition for Certiorari. A copy of the Order of the District Court ruling on the issue presented is attached hereto as Appendix C. A copy of the Order of the District Court denying Plaintiffs' Motion for Reconsideration of the issue presented is attached hereto as Appendix D.

JURISDICTION

Petitioners' Petition for Rehearing En Banc respecting the decision of the Court of Appeals dated March 27, 2001 was denied by the Court of Appeals on July 20, 2001. This Petition for Writ of Certiorari was filed within ninety (90) days of the denial of the Petition for Rehearing En Banc. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C.§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1446(b):

"The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, by service or otherwise, of a copy of the initial pleading setting forth the claim for

relief upon which such action or proceeding is based."

STATEMENT OF THE CASE

Petitioners filed their original Complaint in this action in the State Court of Cobb County, Georgia on July 1, 1999. Respondent removed the case to the United States District Court for the Northern District of Georgia, Atlanta Division on July 30, 1999. Service was perfected on Defendant on August 30, 1999 and Petitioners filed their Motion to Remand which was denied by Order dated October 12, 1999. Petitioners filed a Motion for Reconsideration of the Motion to Remand which was denied by Order dated November 16, 1999. Petitioners and Respondent each filed Cross-Motions for Summary Judgment on the merits of Petitioners' claim and Briefs in support and in opposition. On July 28, 2000 the Trial Court issued its Order denying Petitioners' Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment. Petitioners filed their Notice of Appeal on August 8, 2000 and that appeal was briefed and orally argued before the United States Circuit Court of Appeals for the Eleventh Circuit. The Eleventh Circuit issued its opinion on March 27, 2001 affirming the decision of the Court below. Petitioners filed a Petition for Rehearing En Banc, which was denied by the Eleventh Circuit by Order dated July 20, 2001.

STATEMENT OF FACTS

Petitioner, Angela McAfee, is the widow of David Russell McAfee. The marriage of Angela McAfee and David McAfee produced three minor children, David Russell McAfee, Jr., age 16, Brandon Charles McAfee, age 14, and Michael Chase McAfee, age 9. David McAfee was an employee of Lockheed-Martin Corporation, working at the plant in Marietta, Georgia for a period of approximately 19 years and had been a normal Georgia citizen prior to May 11, 1998. On May 11, 1998 at approximately 7:00 p.m. David McAfee drove to a BP Station/Convenience Store on Highway 41 in Marietta, Georgia. Mr. McAfee stated to the attendant, Roy Wade, that he wanted some beer and that "I'll pay you for it." Mr. Wade saw that McAfee had a gun, became frightened, went inside, locked the door behind him, and advised Mr. Wade's wife, Pattie Wade, to go to the back room. Mr. Wade than called police. Pattie Wade saw David McAfee holding a "long-barrel gun." After a few minutes, when Mr. Wade did not emerge from the store with beer, Mr. McAfee left the premises.

Police officers from both the Cobb County Police Department and the City of Marietta Police Department arrived on the scene and were told by Mr. Wade that the man had left. Mr. Wade pointed the officers in the direction that Mr. McAfee had taken. The Police located David McAfee in his van in the parking lot of the Crab House Restaurant on Highway 41 in Cobb County. Several officers arrived and surrounded the van. The officers ordered Mr. McAfee to put down any gun he was holding and to come out of the vehicle with his hands up. Mr. McAfee exited the vehicle in an apparent attempt to flee on foot, holding a long barreled gun, but returned to his car when confronted by Officer Robert M. Hansen. Shortly thereafter, Mr. McAfee opened the sliding

door of his van, pointed his long barreled gun up in the air, and fired one round. At that time four officers fired their weapons, firing twenty-three rounds into the van. Mr. McAfee was taken to Kennestone Hospital where he was pronounced dead.

An autopsy was performed by Dr. Brian Frist of the Cobb County Medical Examiner's Office. That autopsy reveals that Mr. McAfee died as a result of sixteen gunshot wounds. It is undisputed that none of the gunshot wounds was self-inflicted. All of the gunshot wounds were received as a result of bullets fired by officers of the Cobb County Police Department and Marietta Police Department. An analysis of David McAfee's blood was done by the Georgia Crime Laboratory which revealed that Mr. McAfee was intoxicated having had a blood alcohol level of .18% at the time of his death.

David McAfee was an insured through his employer, Lockheed Martin Corporation, under a policy of insurance issued by Respondent Transamerica Occidental Life Insurance Company, which policy provided benefits for accidental death having a policy limit of One Million Dollars ($1,000,000.00). Dependant coverage for his wife Angela and his children had been purchased as well. Angela McAfee notified Transamerica of the death of her husband, and made claim for the proceeds of the policy. By letter dated October 15, 1998 Transamerica advised Mrs. McAfee that it was denying this claim. Mrs. McAfee requested an appeal of the denial of the claim for the insurance benefits. By letter dated April 26, 1999 Respondent Transamerica reaffirmed its earlier decision not to pay benefits. Mrs. McAfee then initiated this civil ERISA action in an effort to recover the benefits due her and her children for the death of her husband.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Eleventh Circuit completely ignores the requirements imposed by the United States Supreme Court in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 143 L.Ed.2d 448, 119 S.Ct. 1322 (1999) in that the decision violates the plain instructions of the Supreme Court and the plain language of 28 U.S.C. § 1446(b) as interpreted by the Supreme Court and allowed a Defendant to remove Plaintiffs' case from the State Court in which it was filed to a United States District Court before service was perfected upon the Defendant and without the Defendant having waived service as a defense, effectively enlarging the amount of time for the Defendant to make such removal beyond the time limits stated in the statute.

On July 1, 1999 Petitioners filed the above-captioned Civil Action in the State Court of Cobb County seeking to recover benefits under the subject policy. Counsel for Petitioners transmitted to Respondent a courtesy copy of Plaintiff's Complaint by certified mail. However, no service was perfected on Respondent at that time because Respondent had moved its registered agent to a new location without notifying the Secretary of State of Georgia of the change of address. On July 30, 1999 Respondent filed its "Notice Of Removal To The United States District Court" with the State Court of Cobb County and the District Court. The case was then transferred to the District Court for further handling. Service was perfected on Respondent on August 30, 1999.

Petitioners filed their Motion to Remand, asking that the District Court remand the matter to the State Court of

Cobb County. By Order entered October 12, 1999 (Appendix C) the District Court denied Petitioners' Motion. Petitioners then filed a Motion for Reconsideration which was denied by the District Court (Appendix D).

It is apparent from a review of the pleadings filed in this case, most notably the Notice Of Removal To The United States District Court, what has occurred in this matter. The Respondent has removed this matter to the District Court prematurely. The removal statute, 28 U.S.C. § 1446(b), specifies that Notice Of Removal of a Civil Action shall be filed "within thirty days after the receipt by the defendant through service or otherwise of a copy of the initial pleadings setting forth the claim for relief upon which such action or proceeding is based..." (Emphasis added).

The issue of when the removal statute is triggered has been addressed by this Court recently. In Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 143 L.Ed. 2d 448, 119 S.Ct. 1322 (1999) the Court decided as follows:

> "The question presented is whether the named defendant must be officially summoned to appear in the action before the time to remove begins to run. Or, may the 30 - day period start earlier, on the named defendant's receipt, before service of the official process, of a `courtesy copy' of the filed complaint faxed by counsel for the Plaintiff?
>
> We read Congress' provisions for removal in light of a bedrock principle: an individual or entity named as a defendant is not obliged to engage in litigation unless

> notified of the action, and brought under a Court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, `through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service." Murphy Brothers, 143 L.Ed. 2d at 455 (1999).

Respondent Transamerica removed this matter to this Court prematurely as such removal did not come within the thirty (30) day period after service, as is required by the statute and Murphy Brothers. Respondent argues several inconsistent theories as justification.

First, Respondent filed an "Amended Notice Of Removal." When a Notice of Removal is filed, it is filed in the court in which the target case is pending. When the clerk of that court (in this case State Court of Cobb County) receives such a Notice of Removal, the clerk of that Court transfers responsibility for the case to the United States District Court. That is what removal is all about - transferring the case from the State Court to the Federal Court. Thus, after a case has been removed to the Federal Court, as had already occurred in the case at bar, it would be a useless act to "remove it again" as was attempted by Respondent.

The real question presented is whether or not the case was properly removed by Transamerica in the first place. Petitioners respectfully submit that, for the reasons pointed out previously, Transamerica filed its Notice Of Removal out

of time. Thus, the removal itself (not the Notice of Removal document) is defective.

The Orders denying Petitioners' Motion to Remand and Motion for Reconsideration ignore both the Murphy Brothers decision of the Supreme Court and the plain language of the removal statute, as that statute now has been interpreted by the Supreme Court which now, according to Murphy Brothers, says:

> "The notice of removal of a civil action or proceeding shall be filed *within thirty days after the receipt by the defendant*, [by service of process], of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b). (Emphasis supplied).

The key element of this aspect of the issue is interpretation of the words "within thirty days after receipt by the defendant." If those words mean that the time for filing the notice of removal begins upon obtaining a copy by mail, than the defendant has thirty (30) days from receipt by mail to file the notice of removal. Alternatively, if those words mean that there has to be service before the thirty (30) day period begins, defendant would have a window beginning August 30, 1999 (actual date of service) and ending September 30, 1999 to file a removal petition. This Court has decided this issue in such a manner as to create a thirty (30) day window for removal beginning with formal service. Specifically, this Court found that the service of the Summons and Complaint triggers the beginning of the thirty (30) day removal period. Murphy Brothers, 143 L.Ed. 2d at 457-460.

Respondent argued below that, because it had not raised service as a defense in its answer, the above would not apply to it in this case. However, Respondent ignores the following statement from the Murphy Brothers opinion:

> "Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forego procedural or substantive rights." Murphy Brothers, 143 L.Ed. 2d at 457.

While it is true that the Respondent in this case did not raise service as an affirmative defense in its answer, the Respondent took no action to affirmatively waive lack of service as a defense which would preclude it from raising lack of service as a defense in a later motion or other pleading. (See Answer of Defendant). In the Notice of Removal itself, Respondent Transamerica states as follows:

> "2.
>
> Transamerica has not been served with a summons and complaint, although Transamerica received a copy of the complaint by mail from plaintiff's attorney on July 7, 1999." (See ¶ 2, Notice of Removal to the United States District Court). (Doc.1-Pg.1).

It is clear that Respondent has not "waived" service, and had certainly not done so at the time of filing the Notice Of Removal, based upon the above quotation. Given that the Respondent filed the removal petition before the window for filing same had appeared, Respondent did not properly

remove this case to the District Court, and the case should have been remanded.

Prior to the decision of this Court in Murphy Brothers there was a split among the various Circuits about whether the removal period began running with "receipt" of the Summons and Complaint or actual "service" of the Summons and Complaint. In fact, the Murphy Brothers case came from the Eleventh Circuit which had previously held that the time for removal began running with the receipt of the Summons and Complaint, rather than with actual service. See Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 125 F. 3d 1396 (11th Cir. 1997). This Court answered the "receipt versus service" question by reversing the Eleventh Circuit and stating that the time for removal began running with service, not receipt. The Orders denying Plaintiff's Motion for Remand and Motion for Reconsideration interpret the code section at issue in a manner inconsistent with the interpretation of this Court in Murphy Brothers. 28 U.S.C. § 1446(b), as interpreted by this Court in Murphy Brothers, establishes the time frame during which removal must occur.

It is axiomatic that statutes are to be strictly construed. The District Court fails to follow this mandate, by completely ignoring the language of 28 U.S.C. § 1446(b) which requires that the Notice of Removal "shall be filed within thirty days after receipt by the Defendant... of a copy of the initial pleading...." (Emphasis supplied). The United State Supreme Court has interpreted "receipt" to mean receipt by service of process. Thus, the removal must take place after service of process.

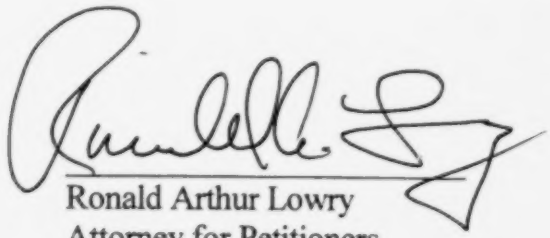
The statute gives the Defendant thirty (30) days to file a Notice of Removal. The Order of the District Court (affirmed without comment by the Panel Decision)

effectively gives the Defendant more than thirty (30) days to file a Notice of Removal, a direct contradiction to the plain language of § 1446(b). This defect is highlighted when one examines the actions of Respondent in this very case. Respondent filed its initial Notice of Removal on July 30, 1999 and its Amended Notice of Removal in the State Court of Cobb County on September 17, 1999 forty-eight (48) days apart.

Petitioners have attached a copy of the panel decision of the Eleventh Circuit in the instant case to this Petition for the convenience of this Court. No reference appears anywhere in the panel decision to the removal issue. In order for lawyers to properly do their jobs they must rely on legal research which yields the case law which tells them what to do. Petitioners relied upon the decision of the United States Supreme Court in Murphy Brothers in the instant litigation. The unpublished Order of the trial court denying the Motion to Remand and the unpublished Order of the trial court denying Petitioners' Motion for Reconsideration appear to be in direct conflict with the opinion issued by this Court in Murphy Brothers. The lawyers and trial judges of the Eleventh Circuit (indeed of the entire nation) need guidance from this Court as to the proper interpretation of Murphy Brothers. Petitioners respectfully request that this Court grant Petitioners' Petition for Certiorari and issue an opinion which can be used by the trial courts and the members of the bar as guidance.

CONCLUSION

Angela McAfee, individually and on behalf of her three children, David, Brandon and Michael, respectfully requests that this Court grant the Writ of Certiorari and that this Court reverse the decision of the United States Court of Appeals for the Eleventh Circuit and remand the matter to the State Court of Cobb County.



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APPENDICES

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14320

D.C. Docket No. 99-01975-CV-CAP-1

ANGELA MCAFEE, individually and as next friend of, as natural guardian of, and as guardian of the property of DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, AND MICHAEL CHASE MCAFEE, minors,

Plaintiff-
Appellant,

versus

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant-
Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

(March 27, 2001)

Before BARKETT, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant, Angela McAfee, wife of the decedent-insured, David Russell McAfee, appeals the district court order denying her Employment Retirement Income Security Act claim against Appellee, Transamerica

Insurance Company, alleging that Transamerica wrongfully denied her claim for death benefits under her husband's accidental death insurance policy on the grounds that his death in a police shooting could not be deemed an "accident" pursuant to the policy under the circumstances presented. We find no reversible error in this determination.

AFFIRMED

APPENDIX "B"
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14320-II

ANGELA MCAFEE, individually and as next friend of, as natural guardian of, and as guardian of the property of DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, AND MICHAEL CHASE MCAFEE, minors,

Plaintiffs-
Appellant,

versus

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendants-
Appellee.

On Appeal from the United States District Court or the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: BARKETT, HILL and KRAVTICH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:99-CV-01975-RLV

ANGELA MCAFEE,

Plaintiff,

v.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant.

ORDER

The plaintiff initiated the instant action against Transamerica Occidental Life Insurance Company [hereinafter "Transamerica"] in the State Court of Cobb County, Georgia, on July 1, 1999. On July 30, 1999, Transamerica filed a Notice of Removal in this court on the grounds that federal question jurisdiction exists and, alternatively, that there is diversity jurisdiction. This matter is currently before the court on the plaintiff's motion to remand to the State Court of Cobb County. For the reasons set forth below, the court hereby **DENIES** the plaintiff's motion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiff brought this action against Transamerica to recover accidental death benefits for the

death of her husband, David McAfee. David McAfee was insured under a group policy issued by Transamerica to his employer, Lockheed Martin Corporation, for basic accidental death benefits of $50,000 and optional accidental death benefits of $950,000. The policy specifically excluded from coverage any loss "caused or resulting from" the following conditions:

> A. Intentionally self-inflicted injuries;
> B. Suicide or any attempted suicide, while sane or insane; ...
> C. Illness, disease, bodily or mental infirmity or any related treatment (bacterial infection resulting from an accidental bodily injury or accidental ingestion or a poisonous substance shall not be excluded); ...

On or about May 11, 1998, David McAfee was shot and killed in an exchange of gunfire with police officers. The plaintiff filed a claim with Transamerica to recover accidental death benefits under the policy, contending that her husband's death was an accidental death under the policy. In reviewing the plaintiff's claim, Transamerica concluded that Mr. McAfee's death resulted from his intentional acts, rather than from accidental bodily injury, and was therefore excluded from coverage. Transamerica's decision was communicated to the plaintiff by letter dated October 15, 1998, which advised the plaintiff of her right to request an administrative review of the claims decision and to submit additional information in support of her claim within sixty days.

On December 18, 1998, the plaintiff requested an administrative appeal. The plaintiff submitted additional information for Transamerica's consideration, including a videotape of the shootout resulting in Mr. McAfee's death, the medical examiner's report, and an investigator's report.

After reviewing this additional information, Transamerica confirmed its decision to deny the claim for benefits.

On July 1, 1999, the plaintiff commenced this action in the State Court of Cobb County, Georgia, seeking recovery of benefits under the policy plus a penalty and attorney fees. Transamerica received a copy of the complaint by mail from the plaintiff's attorney on July 7, 1999, but no formal service was effected at that time. On July 30, 1999, Transamerica filed a Notice of Removal in this court. On August 30, 1999, the plaintiff filed a motion to remand to sate court, asserting that the notice of removal was defective because it was issued prior to service and, therefore, not within the thirty day time period set forth in 28 U.S.C. § 1446.

Transamerica was formally served on August 30, 1999. Eighteen days later, on September 17, 1999, Transamerica filed an Amended Notice of Removal in this court. The plaintiff maintains that the case should be remanded to the State Court of Cobb County, Georgia, because, according to the plaintiff, the original notice of removal was defective as premature and cannot be remedied by the defendant's filing of an amended notice of removal within thirty days of formal service.

II. LEGAL DISCUSSION

A defendant electing to remove a case from state to federal court must follow certain procedural requirements as set out in 28 U.S.C. § 1446. Those requirements include filing a notice of removal within thirty days after the defendant receives a copy of the plaintiff's initial pleading. Section 1446, therefore, limits the period in which a defendant may exercise his right of removal. As section 1446(b) states in part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

A defect in removal procedure, such as an untimely notice of removal, will support a district court's remand of a removed case to state court. 28 U.S.C. § 1447(c). Further, under section 1447 (c), a district court must remand an action to state court if it finds that federal subject matter jurisdiction is lacking.

Prior to 1999, there was a question among federal courts as to when the thirty day period for filing a notice of removal commenced. Some courts had held that it did not begin to run until the defendant received notice of the complaint through formal service of process. Other courts, including the Eleventh Circuit, had held that the thirty day period began to run once the defendant received *any* copy of the complaint from the plaintiff, including a faxed, filed-stamped copy or "courtesy" copy. See, e.g., Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc., 125 F.3d 1396 (11th Cir. 1997), *reversed*, ___U.S. ___, 119 S. Ct. 1322 (1999). The United States Supreme Court answered this question in Murphy Brothers by holding that only formal service of the complaint, or a summons where service of the complaint is not required, will trigger the running of the

thirty day period, not a defendant's receipt of a courtesy copy of the complaint in the absence of formal service.[1]

In the present case, the plaintiff has asked this court to remand her case to state court on the basis that the defendant's removal of the case to federal court was incurably defective. First, this court notes that after a careful review of the law in this area, including an examination of the cases which the plaintiff has cited, it does not find any support for the contention that a notice of removal filed prior to the running of the thirty day period is procedurally defective.[2] Further, even if this court were to hold that the defendant's first notice of removal was defective, the amended notice of removal, which the defendant filed within thirty days after receipt of formal service, would have effectively cured that defect. Finally, the court notes that policy considerations would not support a remand in this case, as there is no harm to the plaintiff occasioned by a premature notice of removal.[3] The court holds that the notice of removal was timely and proper.

III. CONCLUSION

For the foregoing reasons, the court hereby **DENIES** the plaintiff's motion to remand.

---

[1] Murphy Brothers simply established the beginning point for the thrity day period, beyond which removal was not permitted; it did not hold, as suggested by the plaintiff, that removal could not be effected prior to the beginning of that thirty day period.

[2] On the other hand, as the defendant pointed out, there is at least one federal court which has expressly held that the "premature" removal of a case, which is otherwise properly removable to federal court, does not warrant a remand to state court. See Media Corp. v. Digiovanna, 1994 WL 268250 (E.D. Penn., June 14, 1994). The court disagrees with the plaintiff's contention that this case was overruled by Murphy Brothers.

[3] The plaintiff has not argued in her motion for remand that this court lacks subject matter jurisdiction to entertain the case.

SO ORDERED, this 8th day of October, 1999.

/s/
Robert L. Vining, Jr.
Senior United States District Judge

APPENDIX "D"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:99-CV-1975-JEC

ANGELA MCAFEE,

Plaintiff(s),

v.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant(s).

ORDER

The above entitled action is presently before the Court on Plaintiff's Motion For Reconsideration [13]. No response has been filed, pursuant to Local Rule 7.1B.

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration [13] is **DENIED**.

SO ORDERED, this 16 day of NOVEMBER, 1999.

/s/
Julie E. Carnes
United States District Judge

Supreme Court, U.S.
FILED
SEP 20 2001
CLERK

No. 01-315

In The

Supreme Court of the United States

ANGELA MCAFEE, INDIVIDUALLY, AND ANGELA MCAFEE, AS NEXT FRIEND OF, AS NATURAL GUARDIAN OF, AND AS GUARDIAN OF THE PROPERTY OF DAVID RUSSELL MCAFEE, JR., BRANDON CHARLES MCAFEE, AND MICHAEL CHASE MCAFEE, MINORS,

Petitioners,

v.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does the removal statute, 28 U.S.C. § 1446(b), require that a defendant be served with process in state court before he can remove the case to federal court?

If so, was the district court required to remand the case where the defendant, after removing the case, waived service of process, subsequently was served with process, and, within 30 days thereafter, filed an amended notice of removal, and where the district court had subject matter jurisdiction over the case?

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STATEMENT OF THE CASE[1]

On July 1, 1999, Petitioner, Angela McAfee ("McAfee"), filed this action in State Court of Cobb County, Georgia, seeking to recover accidental death benefits under an employee welfare benefit plan sponsored by Lockheed Martin Corporation pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq.* (Doc. 1 – Ex. 3.) Benefits under the plan were funded by a group insurance policy issued to Lockheed by Respondent, Transamerica Occidental Life Insurance Company ("Transamerica"). (Doc. 1 – p. 2; Doc. 25 – Exs. 1 & 2.) By letter dated July 1, 1999, McAfee's counsel sent a "courtesy copy" of the complaint to Transamerica. (Doc. 4 – Ex. A.)

On July 30, 1999, before Transamerica was served with process, Transamerica filed a notice of removal in the Northern District of Georgia. (Doc. 1.) Transamerica removed on the alternative bases of federal question jurisdiction and diversity jurisdiction. (*Id.*) On August 6, 1999, Transamerica filed an answer but did not assert an affirmative defense regarding lack of service of process or lack of personal jurisdiction. (Doc. 2.) On August 30, 1999 – 60 days after the complaint was filed and 31 days after the case was removed – Transamerica's registered agent was served with the complaint and a summons. (Doc. 5.)

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[1] The Petition for a Writ of *Certiorari* will be referred to as "Pet. ___". The Appendix in the Petition will be referred to as "Pet. App. ___". The applicable page numbers will be indicated in the blanks. The remainder of the citations (*e.g.*, Doc. 1 – Ex. 3) will refer to the Eleventh Circuit's Record.

On the same day that Transamerica was served with process, McAfee filed a motion to remand the case to state court, arguing that the removal was premature because the notice of removal was filed before Transamerica was served with process. (Doc. 4.) Transamerica opposed the motion and, within 30 days of being served with the complaint and summons, filed an amended notice of removal. (Docs. 8 & 9.)

The district court denied McAfee's motion to remand, determining that the notice of removal was timely. (Pet. App. C.) The court found no support for McAfee's contention that a notice of removal is procedurally defective when filed after receipt of a complaint but before commencement of the 30-day period for removal provided by 28 U.S.C. § 1446(b). (*Id.* at 5.) The court found that even if Transamerica's original notice of removal was defective, the amended notice of removal, filed within 30 days after formal service of process, effectively cured that "defect." (*Id.*) Finally, the court found that policy considerations did not support a remand, as there was no harm to plaintiff occasioned by the "premature" removal. (*Id.*) McAfee filed a motion for reconsideration, which the district court denied. (Pet. App. C.)

Thereafter, McAfee and Transamerica filed cross-motions for summary judgment on the issue of whether McAfee was entitled to accidental death benefits under the plan. (Docs. 23 & 25.) The district court denied McAfee's motion and granted Transamerica's motion. (Doc. 42, pp. 20-21.) The district court entered judgment in favor of Transamerica. (Doc. 43.)

McAfee filed a notice of appeal with the Eleventh Circuit Court of Appeals. (Doc. 44.) She appealed the denial of her motion to remand and the grant of Transamerica's motion for summary judgment. (*Id.*) On March 27, 2001, the Eleventh Circuit affirmed the decision of the district court. (Pet. App. A.) McAfee filed a petition for rehearing *en banc* only as to the removal issue. (Pet. 1.) On July 20, 2001, the Eleventh Circuit denied the petition for rehearing. (Pet. App. B.)

In her petition for a writ of *certiorari*, McAfee appeals only the affirmance of the order denying the motion to remand. (Pet. i.) She does not appeal the affirmance of the order granting Transamerica's motion for summary judgment. (*Id.*) Therefore, the statement of facts contained in McAfee's petition, which describes the circumstances surrounding David McAfee's death and the merits of McAfee's claim for accidental death benefits, is not material to the consideration of the question presented. (*Id.* at 2-3.)

REASONS FOR DENYING THE WRIT

No compelling reason exists for this Court to exercise its discretionary authority to review the Eleventh Circuit's judgment affirming the district court's order denying McAfee's motion to remand. The Eleventh Circuit's judgment is not inconsistent with the removal statute, 28 U.S.C. § 1446(b), or with this Court's decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344

(1999). Moreover, this is not a case of first impression. Since this Court decided *Murphy Brothers*, the Fifth Circuit Court of Appeals and at least one other district court have found that a defendant may remove a case from state court to federal court before service of process is effectuated. Finally, any procedural defect in the removal was cured by Transamerica's waiver of service of process, the subsequent service of process on Transamerica, Transamerica's filing of an amended notice of removal within 30 days thereafter, or by the existence of the district court's subject matter jurisdiction.

I. FILING A NOTICE OF REMOVAL BEFORE THE DEFENDANT HAS BEEN SERVED WITH PROCESS DOES NOT CONSTITUTE A PROCEDURAL DEFECT.

The removal statute provides, in pertinent part, that "[t]he notice of removal . . . shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading. . . . " 28 U.S.C. § 1446(b). Relying on this Court's decision in *Murphy Brothers*, McAfee contends that the words "shall be filed within thirty days" must be strictly construed to mean that a defendant has only 30 days to remove a case, that the 30-day period commences on the date the defendant is served with process, and that a notice of removal filed before the 30-day period commences is premature, and thus procedurally defective. (Pet. 4, 9-10.) It is Transamerica's contention that the district court properly concluded that the words "shall be filed within thirty days" do not mean that a pending case cannot be removed until

after service of process; rather, the removal statute establishes the outer limit or deadline for filing a notice of removal, after which removal is untimely. Transamerica's position is supported by this Court's opinion in *Murphy Brothers*, by subsequent cases, by the Senate Report accompanying the current version of the removal statute, and by policy considerations.

The Fifth Circuit has determined that a defendant may file a notice of removal before service of process is effectuated. In *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001), the court concluded that generally "service of process is not an absolute prerequisite to removal," reasoning, in part, as follows:

> We read § 1446(b) and its "through service or otherwise" language as consciously reflecting a desire on the part of Congress to require that an action be commenced against a defendant before removal, but not that the defendant have been served. (Footnote distinguishing *Murphy Brothers* omitted.) Indeed, 28 U.S.C.A. § 1448, which provides that service may be completed in district court for any removed case from state court in which any one or more of the defendants was not served with process or in which the service was not perfected prior to removal, reinforces a less demanding view of the service "requirement" prior to removal.

Id. at 177.

Moreover, at least one other district court similarly declined to "require some formal submission to state court jurisdiction before there is authority to remove":

> [Defendant's] time limit for removal would not have started to run until it had been properly served. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999). This does not necessarily mean that [defendant] was without the *power* to remove until service had been completed. Removal often occurs by defending parties over whom the court lacks personal jurisdiction. There seems to be no authority or principle barring removal until service has been perfected.

Doney v. CMI Corp., No. 99-1124-CV-W-6-ECF, 2000 WL 554125, at *2 (W.D. Mo. May 4, 2000) (emphasis in original). In short, these cases recognize that a defendant may timely remove a case to federal court before service of process is effectuated.

McAfee contends that to allow removal before the defendant is served with process is inconsistent with this Court's construction of the removal statute in *Murphy Brothers* (Pet. 4, 6), but it is not, as was recognized by both the *Delgado* and *Doney* courts. *See Delgado*, 231 F.3d at 177 n.23 ("the [*Murphy Brothers*] decision did not address whether service was a prerequisite for a defendant to be able to remove a case"); *Doney*, 2000 WL 554125, at *2. In *Murphy Brothers*, this Court granted *certiorari* to resolve a dispute among the circuits as to "whether service of process is a prerequisite for the running of the 30-day removal period," after which a defendant cannot remove a case. 526 U.S. at 349.

In *Murphy Brothers*, the plaintiff filed a complaint in Alabama state court on January 26, 1996. *Id.* at 348. Three days later, the plaintiff faxed a courtesy copy of the complaint to the defendant. *Id.* On February 12, 1996, the

defendant was served with process. *Id.* On March 13, 1996, 30 days after service but 44 days after receiving the faxed copy of the complaint, the defendant removed the case to federal district court. *Id.* The plaintiff moved to remand on the ground that the notice of removal was untimely under 28 U.S.C. § 1446(b) because it was not filed within 30 days of the date on which defendant first "received" the complaint via facsimile. *Id.* The district court denied the motion, but the Eleventh Circuit reversed and remanded. *Id.* at 349. This Court reversed the judgment of the Eleventh Circuit. *Id.* at 356.

This Court construed the removal statute to mean that the "simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service" is the event that triggers the 30-day period, after which a pending action cannot be timely removed. *Id.* at 347-48. This Court reasoned that, by long-standing tradition, service of process is fundamental to any procedural imposition on a named defendant: "An individual or entity is *not obliged* to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Id.* at 347, 350 (emphasis added). This Court further reasoned that Congress, in enacting 28 U.S.C. § 1446(b), did not intend "to dispense with the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant." *Id.* at 352-53. This Court made clear, however, that service of process was not a prerequisite to removal: "In the absence of service of process *(or waiver of service by the defendant)*, a court *ordinarily* may

not exercise power over a party the complaint names as defendant." *Id.* at 350 (emphasis added).

Notwithstanding McAfee's contention that the district court ignored *Murphy Brothers* and the "plain language" of section 1446 (Pet. 8-9), the district court found that section 1446 establishes the period after which a defendant no longer may exercise its right of removal, and that this Court in *Murphy Brothers* held only that formal service of the complaint (or of the summons where service of the complaint is not required) will trigger the running of the 30-day period. (*See* Pet. App. C-5.) The district court correctly explained that "*Murphy Brothers* simply established the beginning point for the thirty day period, beyond which removal was not permitted; it did not hold, as suggested by plaintiff, that removal could not be effected prior to the beginning of that thirty day period." (Pet. App. C-5.) The Eleventh Circuit, in reviewing *de novo* the order denying McAfee's motion to remand, did not err in affirming the district court's ruling. *See Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249, 1251-55 (9th Cir. 1989) (the denial of a motion to remand is reviewed on appeal *de novo*).

To construe the removal statute to allow a defendant to remove before service of process is effectuated is consistent with the Senate Report accompanying the current version of the removal statute. The report explains that "a defendant *is not required* to file his petition for removal *until* 20 days [now 30] after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for." *Murphy Bros.*, 526 U.S. at 352 (citing S. Rep. No. 303, 81st Cong., 1st

Sess. 6 (1949)); *see also Murphy Bros.*, 526 U.S. at 352 (citing H.R. Rep. No. 352, 81st Cong., 1st Sess. 14 (1949)) ("[P]etition for removal need not be filed until 20 days after the defendant has received a copy of plaintiff's initial pleading.").

To construe the removal statute to allow a defendant to remove before service of process is effectuated also furthers the purposes of the removal and remand statutes. The "thrust of the statutory provisions [on removal and remand] is to mandate that the final venue of an action be determined expeditiously." *National Media Corp. v. DiGiovanna*, No. 94-2073, 1994 WL 268260, at * 2 (E.D. Pa. Jun. 14, 1994). *See also Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 n.16 (5th Cir. 1995) (it is Congress' intent to resolve removal issues swiftly, as reflected in the removal and remand statutes).

II. ANY ARGUABLE PROCEDURAL DEFECT WAS CURED WHEN TRANSAMERICA WAIVED SERVICE OF PROCESS OR WAS SERVED WITH PROCESS.

While this Court in *Murphy Brothers* noted that service of process is the official trigger for responsive action by a defendant, it acknowledged that a defendant can take responsive action before it is served with process if it waives service of process. *Murphy Bros.*, 526 U.S. at 350; *see also Lewin v. Cooke*, 95 F. Supp.2d 513, 519 (E.D. Va. 2000) (quoting *Murphy Bros.*). That is precisely what Transamerica did in this case. Upon receiving McAfee's courtesy copy of the complaint, Transamerica filed a notice of removal, acknowledging that it had not been

served with process. (Doc. 1.) Transamerica did not include this statement in the notice because it was insisting on service of process. In fact, seven days later, Transamerica waived service of process by filing an answer that did not raise the affirmative defense of lack of service. (Doc. 2.) *See* FED. R. CIV. P. 12(b); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1021 (5th Cir. 1995); *Federal Deposit Ins. Corp. v. Oaklawn P'ships*, 959 F.2d 170, 175 (10th Cir. 1992). A defendant's waiver of service of process need not be express, as McAfee contends (Pet. 8.), but may be implied, *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 22 (1st Cir. 1992), and certainly will be implied when the defendant files an answer without raising such a defense. *See* FED. R. CIV. P. 12(b). Moreover, three weeks later, Transamerica was served with process. (Doc. 5.)

Based on these facts, the Eleventh Circuit did not err in affirming the order denying McAfee's motion to remand, because any procedural defect in the removal had been cured by the district court's subsequent acquisition of personal jurisdiction over Transamerica. *See Rentz v. Swift Transp. Co.*, 185 F.R.D. 693 (M.D. Ga. 1998) (defects in service of process may be waived or cured under the Federal Rules of Civil Procedure); *see also Doney*, 2000 WL 554125 at *2 (court refused to remand where defendant removed before it was served with process but subsequently filed answer, which did not object to lack of service, thereby waiving lack of service).

III. ANY ARGUABLE PROCEDURAL DEFECT WAS CURED WHEN TRANSAMERICA AMENDED ITS NOTICE OF REMOVAL WITHIN THIRTY DAYS AFTER IT WAS SERVED WITH McAFEE'S COMPLAINT.

Although the argument on which McAfee based her motion to remand was incorrect as a matter of law, Transamerica filed an amended notice of removal out of an abundance of caution. (Doc. 8.) A petition for removal may be amended freely within the 30-day period to remove a case, as set forth in 28 U.S.C. § 1446(b). *See Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982); *Taphouse v. Home Ins. Co.*, 885 F. Supp. 158, 161 (E.D. Mich. 1995); *Schmidt v. Association of Apartment Owners of Marco Polo Condominium*, 780 F. Supp. 699, 701 (D. Haw. 1991); *Rossi, Turecamo & Co. v. Best Resume Serv., Inc.*, 497 F. Supp. 437, 439 (S.D. Fla. 1980). Because the amended notice of removal was filed within the "thirty day period after service" of McAfee's complaint on Transamerica, McAfee's motion to remand was moot and properly was denied by the district court. The district court was correct in finding that "even if . . . defendant's first notice of removal was defective, the amended notice of removal, which the defendant filed within thirty days after receipt of formal service, would have effectively cured that defect." (Pet. App. C-5.)

IV. ANY ARGUABLE PROCEDURAL DEFECT WAS CURED BY THE EXISTENCE OF SUBJECT-MATTER JURISDICTION.

McAfee does not contend that the district court did not have subject-matter jurisdiction. And it is clear that the district court had subject-matter jurisdiction from the time the notice of removal was filed until the time the final judgment was entered. More specifically, the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) because the group policy under which McAfee sought to recover benefits constituted part of an employee welfare benefit plan within the meaning of ERISA, 28 U.S.C. § 1002(1). Moreover, the district court had diversity jurisdiction pursuant to 28 U.S.C. § 1332 because McAfee and Transamerica are citizens of different states, and the value of the matter in controversy, exclusive of interest and costs, exceeded $75,000.

To require a remand where, as here, the district court had subject matter jurisdiction over the parties would be a waste of resources and judicial economy. *See National Media Corp. v. DiGiovanna*, No. 94-2078, 1994 WL 268260, at * 1 (E.D. Pa. Jun. 14, 1994). In *DiGiovanna* the defendants removed the case from state court before the 30-day time limit for removal had been triggered. *Id.* Plaintiff filed a motion to remand, asserting that the removal was premature. *Id.* In denying the motion to remand, the court concluded:

> It is clear that the defendants need not have removed the case as soon as they did. The 30-day period specified for removal is triggered

> only by the filing of a pleading or other document which, on its face, discloses a basis for removal. (Citation omitted.) But there is no provision in the statute, and no case has been cited to me which squarely holds, that premature removal of a case which is in fact properly removable should result in remand.
>
> . . . [W]here the action is in fact removable, and both sides knew it, and the action is in fact removed, it would be a manifest waste of everyone's time and effort to remand the case to state court, so that the defendant could then require the plaintiff to file a complaint, after which the defendant could again remove the action to federal court.

Id. See also Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702 (1972) (the existence of subject-matter jurisdiction at the time of judgment ordinarily cures any defect in removal procedure). Based on McAfee's failure to challenge subject-matter jurisdiction, the district court properly found that "policy considerations [did] not support a remand in this case, as there [was] no harm to McAfee occasioned by the 'premature' removal." (Pet. App. C-5.) As McAfee admits, it would have been "a useless act to 'remove it again.' " (Pet. 6.)

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

This 20th day of September, 2001.

Respectfully submitted,

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United States District Court, E.D. Pennsylvania.

NATIONAL MEDIA CORPORATION

v.

Michael D. DIGIOVANNA, et al.

Civ. A. No. 94-2078.

June 14, 1994.

Abbe F. Fletman, Klehr, Harrison, Harvey, Branzburg & Ellers, Philadelphia, PA, for plaintiff.

H. Marc Tepper, Carl Anthony Maio, Margolis, Edelstein, Scherlis, Sarowitz & Kraemer, Philadelphia, PA, for defendants.

MEMORANDUM AND ORDER

FULLAM, Senior District Judge.

Plaintiff commenced this action in the Court of Common Pleas of Philadelphia County by writ of summons. Defendants have removed the action to this court; their notice of removal asserts that plaintiff's principal office is in Pennsylvania, and that all of the defendants are citizens of either New York or New Jersey, and that the cover sheet in the state court filing reflects that the amount in controversy is in excess of $50,000 (and that, in fact, the amount in controversy is in excess of $50,000).

Plaintiff has filed a motion for remand, asserting that the removal was premature. It is plaintiff's position that the summons did not constitute a "pleading" sufficient to establish the existence of diversity jurisdiction, hence the 30-day period for removal was never triggered and has not yet begun to run. I agree, but that, in my view, does

not resolve the dispute: the real question is, when a case has been removed to federal court, and the case is actually within the jurisdiction of the federal court and properly removable, should it be remanded to state court merely because the defendants removed the case sooner than they were required to?

The statute, 28 U.S.C. § 1441(a) states that:

> . . . any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The statute further provides, 28 U.S.C. § 1446(b):

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

The statute further provides, in § 1447, that motions to remand based upon procedural irregularities must be filed within 30 days after removal, but that, where it appears federal jurisdiction is lacking, the case must be remanded, regardless of when that fact becomes apparent.

It is clear that the defendants need not have removed the case as soon as they did. The 30-day period specified for removal is triggered only by the filing of a pleading or other document which, on its face, discloses a basis for removal. *Foster v. Mutual Fire Marine and Inland Ins. Co.*, 986 F.2d 48, 54 (3d Cir. 1993). But there is no provision in the statute, and no case has been cited to me which squarely holds, that premature removal of a case which is in fact properly removable should result in a remand.

A certain amount of wheel-spinning and wasted effort may be involved in determining the final resting place of any action which is commenced by a writ of summons or other document which does not clarify the jurisdictional possibilities. Where diversity of citizenship is the potential basis for removal, the defendant must act to achieve removal within one year of the original filing, regardless of the amount of information provided in that filing. 28 U.S.C. § 1446(b). The defendant can, of course, seek to compel the plaintiff to file a complaint or other pleading more informative than the summons; and the plaintiff cannot complain if the defendant waits until such further pleading is filed before initiating removal, so long as the removal meets the one-year deadline. But, where the action is in fact removable, and both sides know it, and the action is in fact removed, it would be a manifest waste of everyone's time and effort to remand the case to state court, so that the defendant could then require the plaintiff to file a complaint, after which the defendant could again remove the action to federal court.

The entire thrust of the statutory provisions, read as a whole, is to mandate that the final venue of an action be determined expeditiously. In the present case, plaintiff's

motion for remand, and subsequent briefing, do not question the existence of diversity jurisdiction or the amount in controversy. Plaintiff's sole complaint is that these predicates are not fully disclosed in what plaintiff filed in state court. In my view, plaintiff has not shown a valid basis for remanding this action to the state court. The remand motion will be denied.

ORDER

AND NOW, this 14th day of June, 1994, it is ORDERED:

That plaintiff's motion to remand this action to state court is DENIED.

United States District Court, W.D. Missouri,
Western Division.

John M. DONEY, Plaintiff,

v.

CMI CORPORATION, et al., Defendants.

No. 99-1124-CV-W-6-ECF.

May 4, 2000.

Davis T. Greiss and William H. Pickett, William H. Pickett, PC, Kansas City, MO, for Plaintiff.

Helaina Bardunias, John Christian Aisenbrey and Mark McKay Iba, Stinson, Mag & Fizzell, P.C., Kansas City, MO, for Defendants.

ORDER

SACHS, J.

Before the court are plaintiff John M. Doney's motion to remand this action back to the Circuit Court of Jackson County, Missouri, and defendant Kustom Signals, Inc.'s ("KSI") motion to dismiss defendant CMI Corporation as a party to this action. Because the motions are interrelated, they will both be addressed in this order.

Plaintiff Doney brought this products liability action arising from his use of traffic radar units from 1984 through 1994 while he was employed with the police departments for Grain Valley, Missouri, and Lone Jack, Missouri. Plaintiff alleged that an entity named CMI Corporation, a Michigan corporation, designed, manufactured, and distributed radar units known as "Speed Gun Six" and "Speed Gun Eight." The radar units known by

those names were, in fact, manufactured by CMI, Inc., not CMI Corporation. The two entities have nothing to do with each other, and plaintiff now admits that CMI Corporation was mistakenly named as a party defendant.

The plaintiff attempted to serve both defendants by first class mail on October 25, 1999. Neither defendant returned the waiver of service. On November 4, 1999, Thomas W. White, outside counsel for non-party Continental Information Systems Corporation, CMI Corporation's parent, sent a letter to plaintiff advising him that CMI Corporation was named in error, that the plaintiff was expected to correct the error, and that CMI Corporation would make no formal response absent further communication from the plaintiff. KSI filed its notice of removal with this court on November 23, 1999. CMI Corporation did not sign KSI's notice of removal.

The plaintiff moved this court to remand the action based on its argument that both defendants had been served, but that CMI Corporation failed to join the notice of removal within the thirty day time limit, in violation of the rule of unanimity as stated in numerous cases, including *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997). KSI countered, and the plaintiff now agrees, that CMI Corporation had not, in fact, been served, because it did not return the waiver of service. KSI also argued that, even had CMI Corporation been properly served, it would not have been required to join the notice of removal because it was admittedly improperly joined as a party. *See Bradley v. Maryland Casualty Company*, 382 F.2d 415, 419 (8th Cir. 1967) (unnecessary or nominal parties need not join in removal).

The plaintiff, in his reply, poses a new theory as to why the action should be remanded.[1] The plaintiff now claims that since KSI never returned its waiver of service, and was not formally served, KSI was not a party to the lawsuit and had no power to remove the action to this court. Plaintiff finds support for this argument in the language of the removal statute, 28 U.S.C. § 1446(a):

> A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders *served* upon such defendant or defendants in such action.

(emphasis added). Because the statute requires inclusion of any papers served upon the defendants, the plaintiff claims that a defendant has no power to remove until he had been served, because otherwise, there would be nothing to include. The plaintiff's own brief defeats this argument, as he acknowledges that a defendant may remove if he has formally waived service. Any defendant waiving service would have nothing "served" to include with his notice of removal.

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[1] The plaintiff complains that defendant KSI filed a surreply without having sought leave of the court to do so. While it is true that KSI should first have requested leave to file its surreply, the court would have undoubtedly granted such leave, as the plaintiff's position in its reply brief not only raises new arguments, but is a position 180 degrees from the position it took in its initial brief seeking remand. Accordingly, the court considered all briefs submitted.

It is true that because it was never served, KSI did not have to do anything to defend the lawsuit. Its time limit for removal would not have started to run until it had been properly served. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999). This does not necessarily mean that KSI was without the *power* to remove until service had been completed. Removal often occurs by defending parties over whom the court lacks personal jurisdiction. There seems to be no authority or principle barring removal until service has been perfected. The federal district court is free to consider these issues unless it is apparent that the federal court lacks subject matter jurisdiction, in which case it should first remand the case to the state court. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). In this case, plaintiff Doney does not claim that this court lacks subject matter jurisdiction. It is claimed that neither the Missouri court nor this court had any jurisdiction over defendant KSI because it was never served. KSI correctly equates its filing of an answer in this court, which did not object to the lack of service, with a general entry of appearance, which acts to waive the service requirements. *See Walker v. Gruner*, 875 S.W.2d 587, 588 (Mo. Ct. App. 1994).[2] This was of course after the attempted removal. While the question presented seems novel, the court declines to

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[2] Indeed, a party who was never served, yet entered an appearance, may win a lawsuit, receive an award, and become a "prevailing party" as a matter of law, even though the lack of service would not require a response. *See Francois v. Martin*, 205 F.3d 1345, 2000 WL 127500 (8th Cir. 2000) (unpublished opinion).

require some formal submission to state court jurisdiction before there is authority to remove.

KSI also moves the court to dismiss CMI Corporation as a defendant in this lawsuit. Since the plaintiff now admits that CMI was named in error and is not a proper party to the suit, the motion will be granted, and CMI Corporation will be dismissed.

For the above-mentioned reasons, it is hereby

ORDERED that the plaintiff's motion to remand (ECF doc. 8) is DENIED. It is further

ORDERED that defendant KSI's motion to dismiss (ECF doc. 13) defendant CMI Corporation as a party to this suit is GRANTED. Defendant CMI Corporation is hereby dismissed from the suit. It is further

ORDERED that plaintiff's motion for an extension of time (ECF doc. 17) in which to file his reply suggestions is DENIED as moot. Finally, it is

ORDERED that the plaintiff's motion to stay discovery (ECF doc. 23) pending resolutions of the motion to remand and the motion to dismiss is DENIED as moot.